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As to the *third* point, *answered* for the defenders, That though proponing peremptory defences generally exempts the pursuer from proving the passive titles, yet where either dilatory defences are proponed, or objections against the relevancy of the libel, here there is no right peculiar to the defunct assumed, (as in the case of proponing peremptors) it being proper for any man to say, that either he is not legally cited, or not before a proper judge; or that the facts libelled upon do not infer the conclusion. And of this last sort is the present defence, viz. that the defunct's having barely dieted with the pursuer, did not infer an obligation upon him to make payment, and that necessarily the same continued yet due, unless the pursuer libelled a positive paction, and that the samen was yet resting owing; for this is properly not so much a defence, as an objection against the relevancy of the libel.

Replied for the pursuer, That as the proponing prescription is undoubtedly a peremptory defence, so there is no principle of our law better established than this, that such a defence cannot be proponed, without acknowledging the passive titles; for how can a defender propone a defence competent to his predecessor, without acknowledging that he represents him?

THE LORDS repelled the defence, That there was no paction; and found an aliment due three years before the citation: and found the defender cannot propone prescription, without acknowledging the passive titles.

Act. *Graham.* Alt. *Jo. Falconer.* Clerk, *Gibson.*

Bruce, v. 1. *No* 106. *p.* 131.

1717. *July.*

WILLIAM WILSON *against* The CHILDREN and HEIRS of ALEXANDER SHORT, Merchant in Stirling.

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A disposition was granted on death-bed in prejudice of the granter's apparent heir, but with this condition, that the disponee should denude in favour of the apparent heir's children whenever they should exist. The apparent heir granted a trust-bond in order to have the subject adjudged from him as repre-

JAMES SHORT made a disposition of his heritage, upon death-bed, to Mary Scot his mother, in prejudice of Alexander Short his eldest brother and heir; and the mother afterwards conveys her right in favours of her grandchildren the Lord Salin's daughters, under this condition, 'That in case of heirs of her 'eldest son Alexander's own body, Salin's children should denude in their fa-'vours.' In the mean time, Lord Salin obtained bonds from the said Alexander, upon which he adjudged from him the heritage, as charged to enter heir to James his brother; but at the same time granted a back-bond, wherein he obliged himself, so soon as he should attain possession, to dispone the same in favours of Alexander Short in liferent, and to the heirs of his body in fee; which back-bond was registered. Afterwards, it happened that Alexander Short had children of his own body, who in their minority intented action against Lord Salin's daughters, for denuding of the subjects disponed to them by Mary Scot, in terms of the above quality in the disposition: In which

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senting the defunct, and took a back-bond obliging the trustee to denude of the adjudication in favour of him, the apparent heir in liferent, and his children in fee. In a process at the instance of these children against the death-bed disponee, to denude in their favour, in terms of the above condition; the trustees objected, that the disposition was on death-bed, and so null; but this objection was repelled, it being pleaded for the children, that the the objector had no other interest than as trustee foresaid, which interest was verified by the back-bond granted by him to their father now deceased. Found that the children pleading thus on their predecessor's evident, not as giving them a right, but to shew that the trustee had no right to compete, did not infer the passive title of behaviour, nor did so much as subject them *in valorem*.

process, compearance was made for Lord Salin, who did *allege*, That he had an interest to hinder his daughters to denude, because he, as creditor to Alexander Short, had adjudged from him, as charged to enter heir to James Short, the said James's rights, whereby he was entitled to reduce the disposition to Mary Scot, as done on death-bed, in prejudice of Alexander Short, James's apparent heir; and that therefore he would not suffer that right to be conveyed, but insisted to have it reduced, and declared null. It was *answered* for the pursuers, That Lord Salin could not found upon his adjudication, or any debt in his person, to prejudge Alexander Short's children, because his rights were only in trust; and that he was obliged by his back-bond, to convey the subject in dispute in favours of Alexander Short in liferent, and his children in fee. Upon which the Lord Salin's daughters were decerned to denude.

It was upon this answer made for Alexander Short's children, that William Wilson, a creditor of Alexander Short, endeavoured, in a pursuit against these children, to fix them in a passive representation to their father; and he *insisted*, That they ought to be liable for their father's debts, because they made use of a right not only belonging to their father, but to which they could not have right but as heirs to him; and that in this the passive title of behaviour was plainly founded, 'Using a right competent to the predecessor, and thereby '*gerentes se pro hæredibus*.' For they must only be understood as substitute in the right, notwithstanding the bond is taken to the father in liferent, and the heirs to be procreate in fee, since at that time they were not in existence; for in all such cases, the fee has still been determined to belong to the father. *2dly*, That it had in it *præceptio hæreditatis*, and must be understood as it had been a conveyance by the father to his children *post contractum debitum*; for the case is all one, as that in place of the father's disponing to Lord Salin, and taking a back-bond from him, to denude in favours of himself in liferent, and the heirs of his body in fee, he had directly made a disposition of these subjects to the heirs of his body; seeing what one does by a trustee, is understood as done by himself. It was owned, That the children's declarator and possession did not proceed directly upon the back-bond; but as to this it was *observed*, Though their declarator and possession was founded upon Mary Scot's right, it was alone supported by Lord Salin's back-bond, without which their right was ineffectual in law; and therefore the legal effects ought not to be attributed to the defective right, but to that which gave it force. In all the above mentioned debate, it was never pleaded that Mary Scot's right was good *per se*, it being without controversy liable to the objection of death-bed; but only that the objection was not good at Lord Salin's instance, in regard of his back-bond to their father. Now, if it was impossible to obtain this decreet, or support Mary Scot's right, but by the back-bond, it must be held in the construction of law the same, as if the decreet had been founded directly thereupon; for it is not only libelling and pursuing upon a predecessor's right, that infers behaviour;

but using or taking the benefit of it, by exception, reply, or any other way. In this argument, it was *contended* to be all one, whether the matter be taken in the view of behaviour or *præceptio;* for the case is applicable to both; it being not only *præceptio* where one possesses *titulo lucrativo post contractum debitum*, but also possessing by any other title, if he make use of the *titulus lucrativus* to defend his possession, and exclude third parties. No 63.

It was *answered* for the defenders, *first*, As to the passive title of behaviour, There is no ground in the reason of the law, or in practice, that the founding any allegeance in law upon a writ, supposing it really had been the defunct's, should infer a behaviour. This is truly a penal passive title, introduced to deter apparent heirs from irregular intromission in prejudice of creditors, (See Lord Stair and Mackenzie upon this head.) Whence it follows, where there is no intromission, no disposal of any part of the defunct's estate, nor any deed whereby creditors can be prejudged; this passive title is not competent. And here the pursuer does not found upon any intromission had by the defenders; for they could not be said to have intromitted even with the paper they founded on, because it was a registered deed, and they made use of the extract. In this matter there is a great difference betwixt our law and that of the Romans; among the Romans, they having no services as we have, and no other form of entry, except actual immixtion, or verbal claiming the heritage; so soon as an heir declared his mind to accept of the heritage, he became heir both *active* and *passive*; but with us no declaration, however express, will make an heir either *active* or *passive*. An heir, in our law, must actually enter by a service, or he must intromit; by the one, he becomes heir to all intents and purposes; by the other, for a punishment upon him, he is made liable to all the creditors, who have an interest that their debtor's goods be not abstracted. There is a remarkable decision to this purpose, as it is observed by Dirleton, 20th January 1675, Carfrae *contra* Telfer, No 60. p. 9711, where the LORDS found, "That the proponing a defence of payment, or such like, was not such a deed as could infer the passive title of behaving, unless it were adminicled with intromission or otherwise." For the same reasons it has been found, that the taking out a brieve did not infer a behaviour, 28th June 1670, Eleis *contra* Carse, No 27. p. 9668; where it was also found, that the apparent heir's signing a revocation of deeds done by his predecessor, while minor, did not infer behaviour; though that was as express a declaration of the intention to be heir, as could be; but still there was no intromission, and therefore no behaviour in the sense of our law. 2*do*, An apparent heir can never be liable in a behaviour, where the thing intromitted with, or acclaimed, was not *in hæreditate* of the defunct, and could not be carried by a service to him; and, in this case it is obvious, that by Salin's back-bond, Alexander Short was only life-renter, and the fee stood provided to the defenders themselves; so that their using that writ, or founding upon it, was not using a writ that belonged to the defunct, but a writ that belonged to themselves; and could never be carried

No 63. by a service to him. It is true, the pursuer does pretend, That this writ being procured by Alexander Short the father, and his children being but *nascituri*, he must be understood fiar, and the children only substitutes, because a fee cannot be *in pendenti*. But to this it is *answered*, That a fee cannot be *in pendenti*, is a mere imagination in every case; but allowing the maxim, no argument can be drawn from it; for here the fee of the adjudication was not *in pendenti*, but remained with Lord Salin, and he only obliged to denude in favours of Alexander Short's heirs, upon their existence. There is a great difference betwixt a disposition and infeftment, which denudes the granter, and an obligation to grant a disposition, which does not denude; in the case of an obligation, there is no pretence for applying this maxim, because the granter is not denuded; the fee of the subject remaining with him, until the existence of the person who is entitled to demand of him to denude of the fee. 3*tio*, Supposing Alexander Short fiar by the conception of the bond, the defenders founding thereupon in the manner they did, could infer no behaviour; for they did not claim that back-bond to belong to them, nor any benefit thereby, so as to desire Salin to denude of the subjects and diligences in their favours; but made use of it only as a mean of proof that these diligences were in Salin's person only in trust, and therefore *jus tertii* for him to quarrel their rights; they only proponed a negative exception, "That Saline could not make use of these rights," not because they were theirs, but because they were not Salin's. There is no manner of inconsistency, for the defenders to have said that these titles of Salin's were *in hæreditate jacente* of their father; and therefore suppose they would not use them themselves, they would not suffer Salin to use them in their prejudice; just as an apparent heir, in case another person really not heir should offer to serve to his predecessor, might compear and object against that service, and say, "That the purchaser of the brieves is not heir, but that he himself is nearest heir." This an apparent heir might do, without the least hazard of behaviour; it would still be entire for him to accept of the succession, or not, as he thought fit.

To the *second* allegeance, That the defenders are liable *præceptione hæreditatis*; it was *answered*, Since they did not claim the benefit of the back-bond, so as to make Salin denude in their favours, it can never be said, there was any right derived to them from their father, or that they possessed by virtue of a right from him; the back-bond, indeed, had that effect, that it debarred Salin from questioning Mary Scot's right, which is their title of possession; but it will never follow, because that back-bond was granted to their father, therefore they possess by a right from him. Let the case be stated in the worst view, That the defenders had got a discharge of the action of reduction *ex capite lecti* from their father, that might be pleaded sufficient to make their father *passive* liable as representing James Short, but could never make the defenders liable *passive* as representing their father; far less could the obtaining such a discharge from Salin an adjudger, make them liable; which is yet clear-

er, if it be considered, that Alexander Short his not quarrelling this right of Mary Scot's, or even his taking Salin expressly bound not to quarrel it, suppose he had done so, is not like a positive ratification granted in the defenders favours; for it was still competent to this pursuer, or any other creditor of Alexander Short's, to have adjudged from him as charged to enter heir to James, and then to have reduced the defenders right; and if this was neglected, *sibi imputent.* This is plain, the defenders have no right from their father; only he omitted to quarrel their right, and at most took one creditor, Salin, bound by a deed not to quarrel it; but this was no restraint upon other creditors, and cannot by other creditors be said to be a deed whereby the defenders' rights were strengthened or supported, since against them it had no effect. No 63.

It was *urged*, in the *next* place, for Wilson the pursuer, That in any view, the defenders must be found liable *in valorem;* for since they have got a benefit by a deed of their father's, equity dictates, that they ought to acconnt to his onerous creditors for the value of that benefit.

The defenders acknowledged, That the Lords have sometimes found an apparent heir liable *in valorem*, where he neither had behaved, nor was liable *præceptione;* as for instance, where the father had acquired lands in name of his son, or in a trustee's name for his son's behoof. But the reason was, not only because the son had got a benefit from a right purchased by the father, but because the creditors pursuers sustained a prejudice, by the father's applying so much of his means towards the purchasing that estate in the son's name, or for his behoof. And, 2*do*, It is to be observed, wherever such a case happened, the credisor was entitled to reduce the apparent heir's right; and that being reduced, to affect the subject by a diligence; in which circumstances, to save the trouble and circuit of diligences, the Lords have frequently made the heir directly accountable *in valorem.* All which serves to prove, that the claim here is groundless; for, 1*mo*, The defenders do refuse, that any subject that ever was purchased by their father's money, was, or is lodged in their person. It does not even appear, that the back-bond was purchased by his means or money. 2*do*, They do refuse, that any part of the subject of Wilson's payment, or which he can now affect by any form of diligence, is in their person. He had it, indeed, once in his power, by charging Alexander Short to enter heir, to state himself in his place by adjudication, and to insist against Mary Scot in a reduction *ex capite lecti;* this he has neglected, and now he has it not in his power; but his negligence must land upon himself, and the defenders must be assoilzied, who possess no subject that the pursuer has any manner of claim to.

"THE LORDS assoilzied the defenders."

Act. *Sir Wal. Pringle.* Alt. *Ro. Dundas.*

Fol. Dic. v. 2. p. 32. Rem. Dec. v. 1. No 7. p. 12.